UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 48

Docket No. DA-1221-07-0521-X-1

Danny Vaughan,

Appellant,

v.

Department of Agriculture,

Agency.

March 31, 2011

Danny Vaughan, Durango, Colorado, pro se.

Cliff Lockett, Beltsville, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a separate opinion concurring in part and dissenting in part.

OPINION AND ORDER

¶1 This case is before the Board based on a recommendation of the administrative judge which found the agency in partial noncompliance with a final Board order. For the reasons set forth below, we find that the agency has COMPLIED in PART but remains in NONCOMPLIANCE regarding some issues.

BACKGROUND

¶2 On August 9, 2007, the appellant filed an appeal with the Dallas Regional Office of the Merit Systems Protection Board (MSPB), asserting that, in reprisal for his protected activity under 5 U.S.C. § 2302(b)(8), the agency, among other

things, proposed his removal and lowered his 2004-2005 performance rating to "Fully Successful." MSPB Docket No. DA-1221-07-0521-W-1, Initial Appeal File (IAF), Tab 1. In a March 31, 2009 initial decision on the merits of the appeal, the administrative judge ordered the agency to cancel its "Notice of Proposed Removal," eliminate all references to the proposed removal from the appellant's personnel records, and change the rating on the appellant's 2004-2005 performance appraisal to "Superior." MSPB Docket No. DA-1221-07-0521-W-2, IAF, Tab 34 at 58. The initial decision became the final decision of the Board when neither party filed a petition for review.

¶3 On June 29, 2009, the appellant filed the instant petition for enforcement, asserting that the agency had failed to comply with the final MSPB order. MSPB Docket No. DA-1221-07-0521-C-2, Compliance File (CF), Tab 1. After affording the parties the opportunity to submit evidence and argument regarding compliance, the administrative judge issued an October 28, 2009 compliance recommendation granting the petition for enforcement in part and denying it in part. *Id*., Tab 9. Among other things, the administrative judge found that the agency was in noncompliance regarding modification of the appellant's 2004-2005 performance appraisal. *Id*. at 7-8. She found that the performance appraisal provided by the agency appeared to be the original 2004-2005 appraisal with the old rating crossed out and the new rating checked; it also contained a notation to an attachment that no longer accompanied the appraisal. *Id*. at 8; CF, Tab 7, Attachment C. The administrative judge stated that to comply with the Board's order, the agency needed to issue a new appraisal for 2004-2005 without notations. *Id*. at 9. The administrative judge also ordered the agency to explain its calculation of the appellant's performance award for 2004-2005.

¶4 Because the administrative judge found the agency in noncompliance, this matter was referred to the Board. The parties have now made additional submissions, which have been fully considered.

ANALYSIS

¶5 When the Board finds a personnel action unwarranted, it orders that the appellant be placed, as nearly as possible, in the situation he would have been in had the wrongful personnel action not occurred. *See House v. Department of the Army*, 98 M.S.P.R. 530, ¶ 9 (2005); *Mascarenas v. Department of Defense*, 57 M.S.P.R. 425, 430 (1993); *see also Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). It is the agency's burden to prove its compliance with a Board order. *See New v. Department of Veterans Affairs*, 106 M.S.P.R. 217, ¶ 6 (2007), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008); *Donovan v. U.S. Postal Service*, 101 M.S.P.R. 628, ¶¶ 6-7, *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006). An agency's assertions of compliance must include a clear explanation of its compliance actions supported by understandable documentary evidence. *Tubesing v. Department of Health & Human Services*, 112 M.S.P.R. 393, ¶ 17 (2009); *Bowden v. U.S. Postal Service*, 95 M.S.P.R. 505, ¶ 4 (2004); *Woodson v. Department of Agriculture*, 94 M.S.P.R. 289, ¶ 6 (2003). The appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions of continued noncompliance. *See New*, 106 M.S.P.R. 217, ¶ 6.

The agency is in compliance regarding the appellant's 2004-2005 performance appraisal.

¶6 In the March 31, 2009 final decision in this matter, the administrative judge ordered the agency to change the rating on the appellant's 2004-2005 performance appraisal to "Superior." MSPB Docket No. DA-1221-07-0521-W-2, IAF, Tab 34 at 58. In her subsequent compliance recommendation, the administrative judge ordered the agency to issue the appellant a new performance appraisal for 2004-2005, without cross-outs and notations. CF, Tab 9 at 9. In its November 16, 2009 submission to the Board, the agency submitted evidence showing that it had issued the appellant a new performance appraisal in accordance with the administrative judge's instructions. Compliance Referral

File (CRF), Tab 3 at 8. The appellant subsequently complained that the agency remained in noncompliance because the individuals who signed the appraisal were not his supervisors in 2004 and 2005. CRF, Tab 4 at 4-5. The agency countered, however, that the appellant's supervisor in 2004-2005 had changed positions within the agency and that the current managers of the appellant's office completed the appraisal. CRF, Tab 5 at 4-5.

¶7 As stated above, the agency was required to change the appellant's rating to "Superior." The record shows that the agency has done this. The appellant has cited nothing requiring his appraisal to be completed by the individuals who supervised him in 2004-2005, and we are aware of no such requirement. The record shows that the agency is in compliance in this regard.[1]

The agency is in compliance regarding the appellant's performance award based on his 2004-2005 performance appraisal.

¶8 In its November 16, 2009 submission to the Board, the agency provided evidence showing that it had provided the appellant a performance award for the 2004-2005 rating period commensurate with the "Superior" rating he received. CRF, Tab 3, Attachment 2. In response, the appellant contended that the document provided by the agency was dated prior to the MSPB initial decision and was therefore improper. CRF, Tab 4 at 5, 8.

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[1] In his December 3, 2009 submission to the Board, the appellant complained that the agency had failed to provide the required justification for his rating. CRF, Tab 4 at 5. Thereafter, the agency provided a document, which it asserted supported the appellant's rating. CRF, Tab 5 at 4-5, 10. The appellant complained that his name was misspelled and that the narrative simply paraphrased the examples provided to agency managers to guide them in preparing appraisals and did not address his actual performance. CRF, Tab 6 at 5-6. Nothing in the MSPB's final order or the administrative judge's compliance recommendation required the agency to complete a narrative regarding the appellant's performance and nothing addressed the content of any narrative the agency chose to produce. We note that there is nothing disparaging about the appellant or his performance in the narrative. The appellant cites nothing to support his assertion that the agency is in noncompliance in this regard.

¶9 The record shows that, consistent with the final MSPB order and the administrative judge's compliance recommendation, the agency changed the appellant's performance appraisal for the 2004-2005 time period and then granted him the performance award commensurate with the new rating. The appellant's argument does not rebut the evidence of compliance. Accordingly, we find that the agency is in compliance in this regard.

The agency is in noncompliance regarding the requirement to eliminate all references to the proposed removal from the appellant's personnel records.

¶10 As mentioned above, the March 31, 2009 final MSPB decision in this matter ordered the agency to eliminate all references to the proposed removal from the appellant's personnel records. MSPB Docket No. DA-1221-07-0521-W-2, IAF, Tab 34 at 58. The appellant complained before the administrative judge that his former supervisor provided the Office of Personnel Management (OPM) a supervisor's statement as part of the appellant's disability retirement application and that the statement referred to the proposed removal.[2] CF, Tab 1 at 6-7. In her compliance recommendation, the administrative judge found that the supervisor's statement did not constitute a personnel record included under the final order in this matter and that the statement submitted to OPM is in that organization's files and "is not subject to change or alteration by the agency." CF, Tab 9 at 7. Before the Board, the appellant argued that the supervisor's statement was "obviously a personnel record subject to the Board's authority and responsibility" to correct his records. CRF, Tab 4 at 8.

¶11 The appellant also complained before the administrative judge about references to the proposed removal "in the agency's defense of [the] appellant's [equal employment opportunity (EEO)] complaint." CF, Tab 1 at 7-8. In the compliance initial decision, the administrative judge found that the contents of

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[2] The appellant has apparently been granted disability retirement benefits by OPM. *See* CRF, Tab 6 at 6, Tab 5 at 6.

the EEO investigative file are not the type of records subject to the Board's final decision and that it would not be appropriate to order the agency to alter an affidavit taken in the course of the EEO process. CF, Tab 9 at 5. Before the Board, the appellant disagreed with the administrative judge's finding. CRF, Tab 4 at 7.

¶12 As set forth at the outset of our analysis, when the Board finds a personnel action unwarranted, the agency must place the appellant, as nearly as possible, in the situation he would have been in had the wrongful personnel action not occurred. *See House*, 98 M.S.P.R. 530, ¶ 9; *Mascarenas*, 57 M.S.P.R. at 430; *see also Kerr*, 726 F.2d at 733. The Board's authority in this realm is broad and far-reaching and extends to areas over which the Board would otherwise lack jurisdiction. *Driscoll v. U.S. Postal Service*, 112 M.S.P.R. 498, ¶ 13 (2009); *Marshall v. Department of Health & Human Services*, 110 M.S.P.R. 114, ¶ 6 (2008); *see Clark v. Department of the Air Force*, 111 M.S.P.R. 477, ¶ 9 (2009); *James v. U.S. Postal Service*, 60 M.S.P.R. 504, 509 (1994). Limiting the Board's authority in this regard would only serve to perpetuate the illegal retaliation to which the appellant has been subjected.

¶13 In the context of enforcement of a settlement agreement providing for rescission of an adverse action, the Board has held that in communications with third parties the agency was prohibited from disclosing the circumstances of the settled action. *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶¶ 14-16 (2009); *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 12 (2009). We recognize that the circumstances of this case differ in that, at the time of the supervisor's statement to OPM and the appellant's EEO complaint, the administrative judge had not yet issued the March 31, 2009 initial decision ordering the agency to cancel the proposed removal and eliminate all references to it from the appellant's personnel records. However, once the Board ordered cancellation of the proposed removal, status quo ante relief required that the agency's communications with third parties not disclose the cancelled matter.

Furthermore, status quo ante relief required that the agency take appropriate steps to correct official communications to third parties that contained information about the appellant that was contrary to the Board's decision.

¶14 Thus, in this case, we find that to afford the appellant meaningful status quo ante relief, the agency must inform OPM that the supervisor's statement previously provided regarding the appellant's disability retirement application erroneously referred to a proposed removal that was found retaliatory by the Merit Systems Protection Board. The agency must seek to have references to the proposed removal deleted from the supervisor's statement or have a statement clearly explaining the circumstances surrounding the incorrect information in the supervisor's statement appended to the appellant's disability retirement application. Similarly, to the extent documents referencing the proposed removal were filed with the Equal Employment Opportunity Commission (EEOC), the agency must inform the EEOC that the proposed removal was found retaliatory by the Merit Systems Protection Board. The agency must seek to have references to the proposed removal deleted from the EEOC's records or have a statement clearly explaining the circumstances surrounding the incorrect information appended to the Commission's records.[3] Regarding EEO material maintained by the agency, such as a report of investigation or final agency decision, the agency must either delete references to the proposed removal or append a statement to the files clearly explaining that the proposed removal was found retaliatory by the Merit Systems Protection Board.[4]

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[3] While the agency must contact OPM and the EEOC as provided for in this decision, the agency is not responsible for the actions taken by other agencies in response to the corrected information. *See Modrowski v. Department of Veterans Affairs*, 97 M.S.P.R. 224, ¶ 9 (2004) (finding that the employing agency had no control over OPM's policy regarding the correction of retirement records).

[4] The appellant also complained below that his Office of Workers' Compensation Programs (OWCP) records contained references to the proposed removal. In her compliance recommendation, the administrative judge found that "neither the proposal

ORDER

¶15 As set forth above, the agency has failed to fully comply with the Board's final order on the merits of the appellant's appeal. Accordingly, we ORDER the agency to submit to the Clerk of the Board **within 30 days** of the date of this order satisfactory evidence of compliance with this decision.

¶16 The agency must provide a clear and detailed narrative explanation of its compliance efforts, supported by relevant documentary evidence, in the form of copies of correspondence, statements, and declarations made under penalty of perjury.[5] The appellant may respond to the agency's evidence of compliance **within 15 days** of the date of service of the agency's submission. If the appellant does not respond to the agency's evidence of compliance, the Board may assume that he is satisfied with the agency's actions and dismiss the petition for enforcement.

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notice nor references to it are included in the appellant's [Office of Workers' Compensation Programs] file." CF, Tab 9 at 6. In reaching this conclusion, the administrative judge relied on a declaration made under penalty of perjury from a human resources specialist in the agency's Workers' Compensation Branch. *Id.; see* CF, Tab 7, Exhibit E. The declaration explained that the Workers' Compensation Branch was responsible for creating and maintaining workers' compensation case files and that the employee who provided the declaration had reviewed the file regarding the appellant and there were no references to the proposed removal in the file. CF, Tab 7, Exhibit E. In his submission to the Board, the appellant argued that the statement from an agency official was insufficient to establish compliance and that the agency should be required to submit certified copies of all records related to his employment. CRF, Tab 4 at 7. The Board has held that an unrebutted declaration made under penalty of perjury is sufficient to prove the matters asserted. *Edwards v. Department of Veterans Affairs*, 111 M.S.P.R. 297, ¶ 6 (2009); *Schaefer v. U.S. Postal Service*, 42 M.S.P.R. 592, 595 (1989). Here, the appellant has provided nothing specific suggesting that the declaration from the agency human resources specialist is inaccurate. Nor has he provided anything suggesting that his workers compensation file contains anything improper. Accordingly, we discern no error in the administrative judge's finding in this regard.

[5] The agency is reminded that statements by its representative are insufficient to meet its burden of proof. *Fernandez v. Department of Justice*, 105 M.S.P.R. 443, ¶ 10 (2007) (statements of a party's representative in a pleading do not constitute evidence); *Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995) (same).

¶17 The agency is reminded that if it fails to provide adequate evidence of compliance the Board may impose sanctions against the responsible agency official. The Board's authority to impose sanctions includes the authority to order that the responsible agency official "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." 5 U.S.C. § 1204(e)(2)(A).

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

SEPARATE OPINION OF MARY M. ROSE

CONCURRING IN PART AND DISSENTING IN PART

in

Danny Vaughan v. Department of Agriculture

MSPB Docket No. DA-1221-07-0521-X-1

¶1 I agree with that portion of the majority opinion that finds that the agency is in compliance with the Board's final order with regard to the appellant's 2004-2005 performance appraisal and performance award and I concur in that portion of the opinion. However, I believe that the administrative judge was correct to find in her compliance Recommendation that the agency was in compliance with respect to the appellant's allegations that references to his proposed removal were contained in the agency's portion of his disability retirement application and in the investigative file for his equal employment opportunity (EEO) complaint.

¶2 As the administrative judge correctly found, the information contained in the supervisor's statement attached to the appellant's disability retirement application was accurate when it was submitted, and the agency offered the information in response to a specific request on the form. The Office of Personnel Management (OPM) *granted* the appellant's disability retirement application. Therefore, even assuming that the existence of the reference to the appellant's proposed removal in his disability retirement application somehow constitutes a breach of the Board's final order, any such breach was not material because it can no longer result in any prejudice to the appellant's disability retirement rights.

¶3 Moreover, the disability retirement application belongs to OPM and is not within the agency's control. Because OPM is not a party to this case, the Board's enforcement authority in this matter does not extend to OPM. The Board cannot order OPM to redact the disability retirement application to remove references to the proposed removal. Instead, the Board's authority is limited to ordering the

agency to request that OPM redact its file, a request which OPM is free to honor or not as it sees fit. The relief that the appellant desires, of course, is the redaction of his disability retirement application, which is not within the Board's authority to grant. Therefore, because the Board cannot award the appellant *meaningful* relief on his claim of breach, even if I were to agree that the agency materially breached the Board's final order, I would find that this claim is moot because there is no effective relief that the Board can grant. *See Allen v. Department of Veterans Affairs*, 110 M.S.P.R. 111, ¶ 3 (2008) (petition for enforcement is moot where there is no effective remedy that the Board can provide); *Uhlig v. Department of Justice*, 83 M.S.P.R. 29, ¶ 7 (1999) (an appeal is moot where there is no further relief that the Board can grant); *Cooke v. U.S. Postal Service*, 69 M.S.P.R. 259, 262 (1996) (the Board denied the petition for enforcement where compliance would require the performance of a needless act that could not result in meaningful relief).

¶4 As to the reference to the proposed removal in the appellant's EEO file, I believe that the administrative judge correctly found that such a file is not a personnel file subject to the Board's final order. It is instead an evidentiary file of a snapshot in time as matters existed during the investigation. The majority cites no authority for the proposition that the Board can order the agency either to redact the EEO file or alter the file by appending a statement to it that reflects that the proposed removal was rescinded. Even if an employee prevails in an EEO complaint before the Equal Employment Opportunity Commission or a federal court, the remedy does not include correction or redaction of the EEO investigative file. In the absence of any statute, regulation, or government-wide policy that extends the Board's enforcement authority to ordering the alteration of EEO investigative files, I would find that such an order is inappropriate and that the agency is in compliance in this regard.

¶5 For the above-stated reasons, I respectfully dissent from the majority's finding that the agency is not in compliance with regard to the appellant's disability retirement and EEO files.

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Mary M. Rose
Member